who upon proving to the Warden that a breach had been committed by the sub-lessee, had a right to have the sub-lease immediately cancelled: the Court of Appeal holding that the order of the Warden allowing the Company an extension of 3 months to comply with the terms of the sub-lease was *ultra vires*.

It will be noted that the decision in *Yap Foong* v. *Salak South Ltd.* (*supra*) was based on a breach of covenant other than non-payment of rent. Moreover, the report only contains the substance of the judgment of the Court of Appeal given verbally, and that Court was only concerned with the particular breach mentioned. I do not seek to overrule the decision of the Court of Appeal in that case, which was, doubtless, perfectly correct under the then Enactment.

Presumably, to remedy this hardship, by the 1928 Mining Enactment, section 97 (ii), the Warden was given a discretion as to the cancellation of sub-leases on certain specific breaches of the clauses of the sub-lease, instead of the arbitrary power given by the form of sub-lease, contained in the Schedule to the 1911 Enactment.

This amendment, as I have already stated, in my view, does not apply to the present case. For the purpose of the present case, I hold that the payment of the percentage 'tribute' is the equivalent of rent.

Clearly, under a strict legal interpretation of the present sub-lease, by clause 8, the sub-lease was liable to cancellation. It remains to be seen whether in equity the Court should grant relief.

Counsel for the appellant has argued that the English principles of equity, in general, and in the absence of statutory enactment, have no application in these States. This is a proposition to which I should hesitate to subscribe. To do so, would be setting back the clock. As Sir Henry Maine has pointed out in his "Ancient Law," in progressive societies social necessities and social opinion are always more or less in advance of law, and the three instrumentalities by which the gulf between the two is narrowed are legal fictions, equity and legislation.

I cannot agree that the doctrines of equity are to be side-tracked, pending the passing of Enactment by the legislature. From the earliest times equity has always given relief against a forfeiture where the Court can give compensation for the forfeiture; and especially where the forfeiture in substance was merely security for payment of a monetary sum, as in the present case. Where the forfeiture has been caused by non-payment of rent, the forfeiture was always treated as a mere security for payment, and relievable if the arrears with interest be paid in full.

In the present case, the appellant, so far as I am aware, although he may have risked the cancellation of his sub-lease (in fact, this has not happened) has not been prejudiced in any way. It was not disputed that the respondents were unaware until June, 1933 of the breach of clause 1 by the party to whom they had further sub-let, and as soon as they became aware of the breach, tendered the additional 2% tribute for which they admitted liability under their sub-lease. The amount involved has no bearing on the case. By acceptance of the additional tribute, the appellant can be placed in exactly the same position as he was before the breach.

In my opinion, this is a case in which this Court should in equity grant the respondents relief against the cancellation of the sub-lease (although not on the grounds given by the learned trial Judge), and the appeal should be dismissed and the reversal of the decision of the Warden by the learned Judge be confirmed.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

HOWES, J.

April 16, 1934.

G. STEPHEN.....Plaintiff.

v.

M. VALLIPURAM.....Defendant.

[NEGRI SEMBILAN CIVIL SUIT No. 58 of 1929]

The Civil Procedure Code, 1918, Chapter XXII—Application for execution—Order for payment of judgment-debt by instalments still in force.

So long as an order for the payment of a judgment-debt by instalments exists, the judgment-creditor cannot proceed to execution by attachment and sale.

F. A. P. Wright for the judgment-creditor

Mervyn Farr for the judgment-debtor.

Cur. Ad. Vul

HOWES, J.—So long as the order for payment by instalments exists, I hold that the judgment-creditor cannot proceed to execution. There was no provision in the Judge's order as to what was to be done in the event of the judgment-debtor making default. The remedy

was therefore on default, for the judgment-creditor to apply to have the order as to payment by instalments rescinded. This he did not do until after the order for attachment had issued.

Appeal dismissed with costs. Costs to be set off under section 219 of the Civil Procedure Code.

Appeal dismissed.

[APPELLATE CIVIL JURISDICTION]

HOWES, J.

August 3, 1934.

S. P. L. R. M. RAMASAMY CHETTIAR..... Appellant.

vs.

NORDIN BIN UDA SHUKOR.....Respondent.

[PERAK MAGISTRATES' CIVIL APPEAL No. 22 of 1934]

The Civil Procedure Code, 1918, Section 208—Payment of amount decreed by instalments—Principle on which such payment is granted.

The discretion given to the Court by section 208 of the Civil Procedure Code, 1918, is a judicial discretion and cannot be exercised in an arbitrary manner.

What is a "sufficient reason" under that section must depend on the facts of the particular case. The Court should consider the circumstances in which the debt was contracted, the conduct of the debtor, his financial position and so forth.

The fact that the debtor is an agriculturist, and consequently by virtue of the provisions of section 265 (i) (c) of the Civil Procedure Code, the land immediately appurtenant to his house would not be liable to attachment, is irrelevant to an application for payment by instalments under section 208.

Decision in *Muthupalaniappa Chettiar* v. *Mohamed Yusof*, (1931-1932) F.M.S.L.R. 231, followed.

H. G. Nelson for the appellant.

Respondent in person.

Cur. Ad. Vult.

HOWES, J.—This is an appeal from the order of the Magistrate, Ipoh, by which, on the application of the defendant, it was ordered that the judgment debt of $135/- and costs should be paid by instalments of $5/- a month as from the 10th June, 1934. The original claim was for $149.60 and costs, but the plaintiff consented to judgment for $135/- and costs.

The order was made under section 208 of the Civil Procedure Code which as amended reads:—

> "Where and in so far as a decree is for the payment of money, the Court may at any time and for any sufficient reason, notwithstanding anything contained in the contract (if any) under which the money is payable, order that payment of the amount decreed shall be postponed or made by instalments on such terms as to the payment of interest, the attaching of the property of the judgment-debtor, or the taking of security from him, or otherwise, as the Court thinks fit. Provided that no such order shall be made without due notice to the decree holder."

The grounds of appeal shortly are:—

1. The Magistrate, in making the order, did not exercise in a proper and judicial manner the discretion conferred on him by section 208 (*supra*) in that:—

   (a) No sufficient reason was shown by the defendant why he should be permitted to pay the judgment debt by instalments.

   (b) The rights of the plaintiff under his judgment were disregarded.

   (c) The order for instalments should not have been made in view of the fact that the defendant had deposited a Grant for land, as security for the debt.

   (d) That the consideration of section 265 of the Code by the Magistrate (in his grounds of judgment) was irrelevant on the hearing of an application under section 208.

2. The Magistrate ought not to have made an order for payment by instalments which, in order to pay off the debt, would continue for over 29 months, without providing that in default of payment of any instalment, the plaintiff be at liberty to proceed to execution.

In his grounds of judgment, the Magistrate seems to have based his order solely on the fact that because the defendant is an agriculturist, under section 265 (i) (c) of the Civil Procedure Code, the land immediately appurtenant to his house would not be liable to attachment. The order was not based on the ground of the poverty of the defendant, although in the grounds of